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Supreme Court of the United States

October Term, 1979
Case No. 79-294

CREDE CALHOUN,
Petitioner,

vs.

ROBERT E. HOLMES, *et al.*,
Respondents.

REPLY BRIEF OF PETITIONER

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REPLY BRIEF OF PETITIONER

THE FAILURE OF THE COURT OF APPEALS TO ANSWER THE ASSIGNMENTS OF ERROR

Considerations of time, expense and the relative unimportance of the question argue against continued assertion of the failure of the Court of Appeals to answer the numerous legal claims presented by the appeal of Petitioner and the Bar Association as a basis for this Petition at this time. In retrospect, it should not have been made a part of the Petition for Certiorari, since it has given Respondents a vehicle for confusing and obscuring the important question of judges raising and handling money under the claim of absolute power and then asserting the right to sit in judgment of their own such conduct.

THE GROSS MISCONDUCT OF THE JUSTICES OF THE OHIO SUPREME COURT DENYING DUE PROCESS TO PETITIONER WAS PROPERLY RAISED.

The Disqualification of Respondents Was Raised at the First Opportunity and in a Manner Appropriate Under the Ohio Practice.

Even though the Respondents in their adjudication of the Petitioner's and the Bar's mandamus action gave no indication of the grounds or reasons for its dismissal, the record demonstrates that the federal claim "was brought to the State court with fair precision and in due time" and that the necessary effect of Respondents' judgment was to deny the claim. *New York ex rel. Bryant v. Zimmerman,* 278 U.S. 63, 67 (1928). Accordingly, the record demonstrates that the claim was raised at the first opportunity in a manner appropriate to and in conformity with existing Ohio procedures and practice. *Chicago B&Q R. Co. v. Chicago,* 166 U.S. 226, 231-232 (1896).

The suggestion by Respondents that their failure to disqualify themselves was decided on independent state grounds is sham. The request was made at the first opportunity by including it as part of the prayer of the Mandamus complaint, but not as part of the requested writ. In Ohio, Mandamus, as elsewhere, is a writ issuing from a superior tribunal to an inferior body. *State ex rel. Wanamaker v. Miller,* 164 Ohio St. 174, 175 (1955). It would have been improper to attempt to plead a claim for relief in Mandamus asking Respondents to issue a mandate to themselves to step aside.

No procedure is set forth by Ohio law or provision of the Ohio Constitution as to the manner of seeking disqualification of Justices of the Ohio Supreme Court. Respondents, even though given the constitutional power to do so, have promulgated no rules on this subject. The only case law on the subject is indefinite. In *State ex rel. Wanamaker v. Miller* (1955), 164 Ohio St. 176 it was stated:

> "As to the affidavit of disqualification and the right to file it, this court, *sua sponte,* strikes the affidavit from the files for the reason that the relator has no basis in law for filing it." (At p. 177.)

It is significant that Respondents at page three of their brief in fact make no claim that, *under the Ohio practice,* the federal claim was not properly raised by having amicus raise it in their brief. The cases cited by Respondents at page three of their brief are inapposite.

Under the Ohio law a question is preserved if it is brought to the attention of the trial court "by objection, ruling or otherwise". 4 O. JUR. 3d, *Appellate Review,* p. 298. *See Hayes v. Smith,* 62 Ohio St. 161, 188 (1900). Petitioner's request that Respondents disqualify themselves was contested by Respondents by arguments in their Brief in support of their Motion to Dismiss. Respondents' contest was opposed in the same manner.

The brief filed by Amicus Civil Liberties Union of Cleveland, Inc. opposed Respondents' Motion and unequivocally raised the denial of due process under Section 1 of the Fourteenth Amendment. This brief not only asserted the right to an impartial decision maker as fundamental to the guarantee of due process but cited and discussed in its support three decisions of this court:

Tumey v. Ohio, 273 U.S. 510 (1927)
Dugan v. Ohio, 277 U.S. 61 (1928)
Ward v. Village of Monroeville, 409 U.S. 57 (1972)

In addition, the only authority set out in the Appendix to Amici's brief was a recitation of the provision of Section

1 of the Fourteenth Amendment of the United States Constitution.

In Ohio Amicus Curiae are accorded the same rights to raise and argue questions before Respondents as are parties, except that Amici can present oral arguments only with the consent and within the time allotted to an attorney of record. Rules of Practice of the Supreme Court of Ohio, Rule V, § 65, Rule VI, § 6. There is no Ohio decisional law even suggesting that constitutional questions cannot be raised by Amicus.

THE JUSTICES' MISCONDUCT CANNOT BE EXCUSED ON INDEPENDENT STATE GROUNDS OR OTHERWISE.

1. The Substantial Party, Financial and Bias Interest of Respondents.

As pointed out in Petitioner's and the Bar's brief in support of the request for disqualification, the mandamus complaint raised questions which affected the substantial party, financial and bias interest of Respondents. The very nature of the relief sought posed a serious[1] threat to Respondents of a remand to the Court of Appeals and eventually to the trial court to complete discovery and, after discovery, to complete its determination of the declaratory judgment action. This determination would have included the legality of Respondents' expenditures from this million dollar fund and Respondents' liabilities as trustees for any loss or misappropriation.[2]

The briefs also pointed out the possibility of judicial rebuke by the seven Courts of Appeals' judges sitting in the place of Respondents, as provided for by Article IV, § 2 (A) of the Ohio Constitution, for the deliberate deceit practiced by Respondents as advocate parties attempting to avoid any adjudication which would place specific limits on their power or permit an examination of their handling of this Fund. This is a consequence which even nonelected judges would try to avoid if they had the power to do so.

One of the many instances of judicial deceit pointed out in the briefs was Respondents' highly misleading characterization as parties, of the decision of this court in *Cuyahoga County Bar Assn. v. Supreme Court of Ohio,* 430 U.S. 901 (1977) (p. A20). This type of deliberately misleading legal analysis is illustrated in the claim asserted by Respondents to this court, that the decision in *Buschbacher v. Supreme Court of Ohio* (pp. 3a-4a) collaterally estops Petitioner from relitigating whether Respondents "are a fair and impartial tribunal to determine his claims." (Respondent's brief, p. 4.)

1. It is obvious that an unbiased tribunal could readily have determined that the complaint raised a claim for relief applying the Ohio standard that such motion can be granted only where it appears "beyond doubt that plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *O'Brien v. Tenants* (1975), 42 Ohio St. 2d 242, 245. Applying this standard, an unbiased tribunal could have then determined that the Court of Appeals deliberately evaded answering numerous important questions properly before it in violation of their *clear* obligation under Rule 12(A) and that Petitioner's and the Bar's right to request Respondents to certify this question, did not constitute an adequate remedy in the *ordinary* course of the law. See *State, ex rel. Pressley v. Indus. Comm.* (1967), 11 Ohio St. 2d 131, Syl. 6. (The remedies of statutory mandatory injunction or statutory mandamus available in the Common Pleas Court do not constitute adequate remedies which can defeat the right to bring an original action in mandamus in the Supreme Court of Ohio.)

2. If it is the law that a lawyer who is elected to the bench is, upon assuming office, conclusively presumed to be able to handle public monies without any loss, while the same lawyer elected Governor, Attorney General, County Commissioner, etc., is not to be so naively trusted, it should be established by direct judicial determination and not by inference drawn from the judicial silence of the trial court, the Court of Appeals and the Ohio Supreme Court.

Must Petitioner, in order to avoid drawing an inference of bad faith on the part of Respondents, assume that they are not aware that, under their own rules of procedure, collateral estoppel is an affirmative defense which must not only be pleaded but established by proof? Ohio Civil Rule 8(C). Or can Petitioner reasonably, in view of the failure of Respondents to assert such a position to themselves in support of their Motion to Dismiss the mandamus complaint (pp. A19-A23), conclude that the unavoidable inference to be drawn is that Respondents deliberately intend to mislead this court.

The nature of the certification in *Buschbacher* which Respondents claim conclusively establishes their pristine judicial posture forever is intriguing, since the Federal Court judges only determined that Respondents were not shown to be a biased forum for the determination of a very *limited* issue, namely, whether an attorney should be disciplined for failure to pay the registration fee. The claim rejected in *Buschbacher* was not one made by Petitioner and the Bar in the Federal Court action.

Only a foolish lawyer would claim that Respondents, because they made the rules, could not determine whether an attorney had, in fact, paid or not paid his registration fee. This question is a far cry from the question of whether Respondents, sitting in their own case, can determine whether they do or do not have the constitutional power under the Ohio Constitution to raise and spend public funds without external accountability and whether they are or are not accountable for any loss or misappropriation.

Deliberate judicial misconduct is hardly the way to achieve "the highest possible professional conduct"[3] in a

3. See Court of Appeals' opinion at page 7b of Respondents' Appendix.

profession already plagued with the Monroe Friedman view that, in the zealous defense and prosecution of their client's rights, lawyers can be liars. *See* Ordover, *The Lawyer as Liar,* AMERICAN JOURNAL OF TRIAL ADVOCACY 306 (1979).

The inference that in the related case, *Calhoun v. Supreme Court of Ohio,* the question of whether Respondents should disqualify themselves was not raised is, to be blunt, false. The justices' disqualification was raised, not only by a specific proposition of law, but by a motion. Both were met with Judicial silence.

Whether in fact Respondents have been compensated out of the Disciplinary Counsel's Fund for expenses incurred by them in disciplinary matters, is a question only indirectly addressed by Respondents in their brief. It is submitted that such question should have been a matter of proof in the trial court, rather than a self-serving unsworn, indirect assertion in the last paragraph of the brief filed with this court.

2. The Importance of the Questions Affected by the Petition.

The importance of the ultimate questions which will be affected by the within petition can be fully realized only if it is placed in the context of recent history in which powerful and prestigious lawyers have received kid glove treatment by disciplinary authorities because of the importance of the matters they were engaged in.

It is submitted that our profession has been demeaned long enough by a secretive unaccountable disciplinary system which arrogates to lawyers and judges such decisions as, for example, whether lawyers can be liars and still

continue to practice law and which permits judges to sit in their own cause.

Respectfully submitted,

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APPENDIX

RESPONDENTS' MOTION TO DISMISS THE MANDAMUS COMPLAINT IN THE SUPREME COURT OF OHIO

Case No. 79-177

IN THE SUPREME COURT OF OHIO

CREDE CALHOUN, *et al.*,
Relators,

v.

ROBERT E. HOLMES, *et al.*,
Respondents.

ORIGINAL ACTION IN MANDAMUS

MOTION OF RESPONDENTS FRANK D. CELEBREZZE, THOMAS M. HERBERT, WILLIAM B. BROWN, PAUL W. BROWN, A. WILLIAM SWEENEY, RALPH S. LOCHER AND THOMAS L. STARTZMAN TO DISMISS

Respondents, the Supreme Court of Ohio; Frank D. Celebrezze, Chief Justice; Thomas M. Herbert, William B. Brown, Paul W. Brown, A. William Sweeney and Paul S. Locher, Justices of the Supreme Court of Ohio; and Thomas L. Startzman, Clerk of the Supreme Court of Ohio, respectfully move this Court, pursuant to Rule 12(B) of the Rules of Civil Procedure, to dismiss the Complaint filed herein on the ground that it fails to state a claim upon which relief may be granted.

MEMORANDUM IN SUPPORT OF MOTION

STATEMENT OF THE CASE

Relators instituted an action in the Court of Common Pleas of Franklin County, Ohio, challenging the validity of the portion of the Rules for the Government of the Bar providing for the registration of all attorneys in the state and the payment of a registration fee.

Relators had previously instituted an action in federal court challenging the validity of the same rules. In that action it was determined that the constitutional objections to the rules were without merit and that the rules were in compliance with the provisions of the Federal Constitution. *Cuyahoga County Bar Assn. v. Supreme Court of Ohio,* 430 U.S. 901 (1977).

The Court of Common Pleas sustained the motion of the defendants for judgment on the pleadings finding that there was no dispute as to any material fact and that the defendants were entitled to judgment as a matter of law. Copies of the Judgment Entry and Decision of that court are attached hereto as Appendices A and B.

The Court of Appeals affirmed the judgment of the Court of Common Pleas. It held that the Supreme Court did have the authority to adopt the challenged rules. In its opinion the court explained that historically the Supreme Court, through the exercise of its inherent power, has concerned itself with matters relating to the practice of law and that its practice of adopting rules, which imposed assessments and appointed the personnel necessary to carry out that function, was well established.

The people, by their adoption of the Modern Courts Amendment, embodied this inherent power in the Constitution, by expressly granting the Supreme Court jurisdiction over all matters relating to the practice of law. A copy of the Decision is attached hereto as Appendix C.

Relators filed a motion for reconsideration claiming that the Court of Appeals had not passed upon all of their assignments of error. The court denied the motion on the ground that all of the basic issues were in fact covered and dealt with in its opinion. A copy of that Decision is attached hereto as Appendix D.

Relators filed a notice of appeal from that judgment. In their memorandum in support of jurisdiction, they raised all of the issues raised in the instant case.

Relators then instituted this action alleging that the Court of Appeals failed to pass on all of their assignments of error and seeking a writ of mandamus directing that court to do so.

ARGUMENT

Proposition of Law No. 1

> In Order to State a Cause of Action in Mandamus, a Relator Must Establish a Clear Right to the Performance of a Definite, Specific and Absolute Legal Duty Imposed Upon and Violated by the Respondent.

The relators have the burden of establishing that they are entitled to the extraordinary remedy of mandamus. *State ex rel. Alcoa v. Stebbins,* 40 Ohio St. 2d 52, 54 (1974); paragraph one of the syllabus of *State ex rel. Welsh v. Ohio St. Medical Bd.,* 176 Ohio St. 136 (1964). In order to sustain this burden, they must allege and establish that they have a clear right to the performance of a definite, specific and absolute legal duty imposed upon and violated by these respondents. *State ex rel. Auto*

Loan Co. v. Jennings, 14 Ohio St. 2d 152, 162 (1968); *State ex rel. Bd. of Tax Appeals v. Morgan Co. Budget Comm.,* 174 Ohio St. 297, 299 (1963); *State ex rel. Spellmire v. Kauer,* 173 Ohio St. 279 (1962).

Relators have failed to sustain their burden in the instant case. They are asking these respondents to disqualify themselves from considering and determining this action. There is nothing in the Complaint, however, which could support a finding that relators have a right to such relief or that these respondents have a duty, much less a definite, specific and absolute duty, to disqualify themselves. In fact the relators give no explanation whatsoever for their request.

Relators have failed to establish any legal duty upon these respondents to disqualify themselves. They have, therefore, failed to state a claim upon which relief in mandamus may be granted. *State ex rel. Akron Fire Fighters v. Akron,* 54 Ohio St. 2d 448, 450-451 (1978).

Proposition of Law No. 2

A Writ of Mandamus Must Be Denied if the Relator Has a Plain and Adequate Remedy by Way of Appeal.

Relators have filed an appeal from the judgment which they are attacking in the instant case. In their memorandum in support of jurisdiction, they raise the same claim raised herein, that the Court of Appeals failed to pass upon each of the assignments of error.

Where the relator in a mandamus action has an adequate remedy by way of appeal, this Court is required to deny the writ. Paragraph 3 of the syllabus of *State ex rel. Pressley v. Indus. Comm.,* 11 Ohio St. 2d 141 (1967); paragraph 1 of the syllabus of *State ex rel. Sibarco v. Berea,* 7 Ohio St. 2d 85 (1966); paragraph 3 of the syllabus of *State ex rel. Stanley v. Cook,* 146 Ohio St. 348 (1947); *Lippert v. Engle,* 52 Ohio St. 2d 67 (1977); *State ex rel. Wentz v. Correll,* 41 Ohio St. 2d 101 (1975).

CONCLUSION

For the above reasons these respondents submit that relators have failed to state a claim in mandamus upon which relief may be granted and that the Complaint should be dismissed.

Respectfully submitted,

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